

1703652 (Migration) [2019] AATA 3953 (14 June 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1703652
MEMBER:	David Barker
DATE:	14 June 2019
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl.820.211(2)(a) of Schedule 2 to the Regulations; • cl.820.211(2)(d)(ii) of Schedule 2 to the Regulations; • cl.820.221 of Schedule 2 to the Regulations; • r.2.03A.

Statement made on 14 June 2019 at 9:35am

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine de facto relationship at time of application – credible witnesses – registered under relevant State law – genuine spousal relationship at time of decision – Schedule 3 criteria applies – application lodged outside of relevant timeframe – compelling reasons – reasons for not holding a substantive visa – longstanding genuine relationship – effect on mental health condition – estrangement from family of origin – treatment of members of the LGBTI community – decision under review remitted

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5CB, 5F, 65

Migration Regulations 1994 (Cth), rr 1.09A, 1.15A, 2.03A; Schedule 2, cls 820.211, 820.221; Schedule 3, Criterion 3001

CASES

Babicci v MIMIA (2005) 141 FCR 285

He v MIBP [2017] FCAFC 206

MZYPZ v MIAC [2012] FCA 478

Re MILGEA and Dhillon [1990] FCA 144
Waensila v MIBP [2016] FCAFC 32

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant applied for the visa on 11 November 2016 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(d)(ii) of Schedule 2 to the Regulations. The delegate found that the applicant did not meet the timeframe requirements for the visa and there were no compelling reasons not to apply the requirements. Therefore she could not meet an essential requirement for the visa.
5. The applicant appeared before the Tribunal on 12 June 2019 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor, [Dr A].
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

7. BACKGROUND

8. The applicant is a national of Indonesia and is [age] years old.
9. The sponsor is a national of [Country 1] and is [age] years old. She became a permanent resident of Australia in May 2013 on the basis of the grant of a [Skilled visa].
10. The visa application forms state the parties met at a friend's party [in] August 2015. They elsewhere claim they started a committed relationship shortly thereafter. The parties registered their relationship with NSW Births, Deaths and Marriages [in] August 2016 and subsequently married in Sydney [in] June 2018.
11. The delegate's decision record, a copy of which was provided with the review application, indicates the applicant first arrived in Australia [in] September 2008 on a [Student visa] and was granted three further Student visas, with the last ceasing on 13 August 2014. On 20 July 2014, the applicant lodged an application for a [Skilled visa]. This application was refused on 31 October 2014. She lodged an application for review of this decision with the Migration Review Tribunal (MRT) on 13 November 2014 and the MRT, [in December] 2014, found there was no jurisdiction for review of the decision. The applicant lodged an application for review of the MRT decision with the Federal Circuit Court (FCC) on 23 December 2014, but subsequently withdrew this application for judicial review on 28 November 2016.
12. The delegate found the applicant's last substantive visa ceased on 13 August 2014 and that as she did not apply for the Subclass 820 visa within 28 days of that date, she did not meet criterion 3001 of the Schedule 3 criteria in the Regulations. The delegate stated that they were not prepared to accept the applicant and sponsor were in a genuine and continuing de facto relationship based on the limited and short-term nature of the evidence available at the

time of their decision in February 2017. The delegate expressed concern that the applicant appeared to have only committed to a relationship with the sponsor in the latter stages of a judicial review process in relation to the refusal of her application for the [Skilled visa] and subsequently withdrew her application for the judicial review once there was a potential Partner visa pathway available to her. The delegate was not satisfied that the applicant had demonstrated there were compelling reasons to not apply the Schedule 3 criteria.

13. Prior to the hearing the applicant provided information to the Tribunal including but not limited to the following:
- Written statements, submissions and declarations from the applicant;
 - Written statements and declarations from the sponsor;
 - Annotated photographs;
 - Witness support statements and declarations;
 - Medical and health professional reports;
 - Banking and other financial records,
 - Utility accounts and other correspondence addressed to the applicant and sponsor at [Street 1], [Suburb 1], NSW;
 - Travel records;
 - Information and media reports regarding the activities of [Mr B]; and
 - Information regarding the treatment of LGBTI people in Indonesia.

CONSIDERATION OF CLAIMS AND EVIDENCE

14. The issues in the present case are:
- i. Whether the applicant and her sponsoring partner were in a genuine spousal or de facto relationship at the time of application and at the time of this decision; if so
 - ii. Whether the applicant held a substantive visa at the time of her application, or had applied within 28 days of the day her last substantive visa ceased; and, if not,
 - iii. Whether there are compelling reasons not to apply the Schedule 3 requirements.
15. In making its findings, the Tribunal has considered the documents contained in the Department and Tribunal files, as well as the oral evidence provided by the applicant and sponsor at the hearing. The Tribunal notes that it has the benefit of considerably more evidence than was available to the Department at the time of the delegate's decision.
16. The parties' oral evidence regarding the circumstances in which they met, the development of their relationship and their current living circumstances was consistent and credible. Their oral evidence during the hearing was also consistent with the very extensive documentary evidence provided with the review application. The Tribunal found the applicant and sponsor to be credible witnesses who gave their evidence in a calm, rational manner without embellishment. The Tribunal is satisfied that weight can be given to the oral evidence of the applicant and sponsor.
17. The Tribunal has reviewed the considerable amount of bank and other financial records, witness support statements, photographs and the oral and written evidence provided by the applicant and her sponsor. On the basis of this evidence and in relation to the parties' relationship, the Tribunal makes the following findings:

- The parties do not own real estate, held separately or jointly. They have no shared liabilities or legal obligations with respect to each other. The Tribunal acknowledges that it is two and a half years since the applicant requested a review of the Department's decision to refuse the visa and the parties' decisions as to shared investments and some of their financial factors is influenced by their uncertainty as to how their financial circumstances may be affected by decisions flowing from the outcome of the review process. They do have a joint bank account, into which they were both transferring funds and meeting regular household expenses until the applicant ceased work after the refusal of her application for the Partner visa. The sponsor contributed to rent costs at the [Suburb 2], NSW rental property which they were both renting at the time of application in November 2016 and currently pays the full rent for the one bedroom apartment the parties lease in [Suburb 1], NSW.
- The parties were at the time of application time sharing regular expenses, pooling their finances and generally structuring their financial affairs in a manner which is indicative of two people in a genuine and continuing relationship. The applicant lost work rights in February 2017, following the refusal of the Partner visa application. Since that time she has been fully financially reliant on the sponsor. The Tribunal sees nothing untoward in this arrangement, given the applicant's stated wish to be at all times complying with requirements to be a lawful noncitizen in Australia. The Tribunal is satisfied that at the time of this decision, the applicant and sponsor continue to structure their financial affairs in a manner which is indicative of a couple in a genuine and continuing relationship.
- The parties have not lived separately and apart on a permanent basis since committing to a relationship with each other in November 2015. They maintained separate rental properties for a period of time, as the applicant shared an apartment with her younger brother in [Suburb 2], NSW, who she was financially supporting and felt a level of responsibility toward, and the sponsor continued to rent a small apartment near to the [workplace] where she worked in the eastern suburbs of Sydney. Upon the sponsor being transferred to a [workplace] in [Suburb 3] during 2016, she was added to the lease for the [Suburb 2] property and commuted there regularly when her [work] shifts permitted. Since the sponsor secured a transfer to [Employer 1] in January 2017, the parties have relocated and live together on a full-time basis in [Suburb 1], NSW.
- The parties share domestic tasks and run their household in a manner which is indicative of a couple in a genuine and continuing relationship, where at the time of application they both undertook housework tasks, but at the time of decision the applicant is not working in paid employment and has taken primary responsibility for cooking, cleaning and related tasks within their home. The parties have shared shopping, as this is an activity they enjoy doing together. The parties do not have joint responsibility for the care and support of children. The Tribunal accepts they have considered having children, but that the [sponsor] is mindful of the complex procedures associated with IVF treatment and this influences their thinking on this matter.
- The parties were, at the time of application and at the present time, representing themselves to friends, their local community in Sydney and members of the sponsor's family as a couple, initially as de facto partners, but more recently as a married couple. The parties maintain regular communication with and have the support of the sponsor's family regarding their relationship. The parties plan and undertake joint activities: such as visiting friends and the sponsor's younger sisters, shopping in the CBD, going to restaurants and cafes, and attending house parties and other events through the social networks they are linked with;

- The Tribunal finds that the applicant and her sponsor have been in a committed relationship since in or around November 2015.
- The parties married in Sydney in June 2018, having previously registered their de facto relationship with the relevant authorities in NSW in August 2016.
- The Tribunal is satisfied the parties see their relationship as stable, mutually supportive and long-term. The Tribunal considers the parties' evidence with regard to their commitment to each other to be plausible, persuasive and sincere.
- The extent to which the parties support each other and are committed to the welfare of each other and provide each other with companionship and support provides significant weight in support of a finding that they are in a genuine and continuing relationship.

Whether the parties are in a spouse or de facto relationship

18. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is a permanent resident of Australia.

19. In *Re MILGEA and Dhillon* [1990] FCA 144 (*Dhillon*), the Federal Court stated:

20. people enter marriages with a variety of purposes and motives, hopes and anticipations, so that it is not possible to classify some purposes etc. as according to what may be described as 'community expectations'. It is not necessarily inconsistent with a genuine marriage relationship that it was entered into by one or both parties with a view to material benefit or advancement, as for example with the hope of becoming eligible to reside in a particular country. The true test, we would suggest the only test, is whether at the time at which the matter has to be decided it can be said that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of others.

Were the parties in a de facto relationship at the time of application and a spousal relationship at the time of decision?

21. As the parties were not married to each other, at the time of application, under a marriage that is valid for the purposes of the Act, they could not, at the time of application, satisfy an essential requirement of a spouse relationship, but may meet the criteria on the basis of being in a de facto relationship as defined in s.5CB of the Act. A person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
22. In forming an opinion as to whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects, the nature of the parties' household and their commitment to each other as set out in r.1.09A(3).
23. In accordance with the available evidence and having regard to all the circumstances of this relationship, the Tribunal is satisfied that the parties, at the time of application for the Partner visa in November 2016, had a mutual commitment to a shared life together to the exclusion of all others. The Tribunal is satisfied that at that time the relationship between the applicant

and sponsor was genuine and continuing. The Tribunal finds the parties were at the time of application living together and not living separately and apart on a permanent basis. The Tribunal is satisfied that the financial aspects of the parties' relationship at the time of application were indicative of a couple in a genuine relationship, albeit where one member of the relationship had a significantly higher earning potential than the other. The Tribunal is also satisfied that at the time of application, the social and commitment aspects of the relationship and the nature of their household arrangements were indicative of a couple in a genuine relationship. Further to this, the Tribunal finds that the applicant and sponsor are not related by family.

24. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

25. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The Tribunal's file contains a copy of a Commonwealth of Australia Marriage Certificate indicating the applicant and sponsor married at the NSW Registry of Births, Deaths and Marriages, Sydney, NSW [in] June 2018. The Tribunal has no reason to doubt the authenticity of this document.
26. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

27. The Tribunal notes there is no evidence to suggest either of the parties is in a relationship with a third party. There is also no evidence to establish the parties do not live together at the present time at the same residential address in [Suburb 1], NSW. I consider the financial, household, commitment and social aspects of the parties' relationship are at the time of this decision, indicative of a couple in a spousal relationship. Consistent with *Dhillon*, the Tribunal considers that the relevant test in this matter is whether at the time at which the matter has to be decided, it can be said that the parties have a mutual commitment to a shared life as spouses to the exclusion of others. It is the Tribunal's view that there is persuasive evidence that at the time of decision the parties are in spousal relationship.
28. On the basis of the above, the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time of the application and is satisfied that the requirements of s.5F are met at the time of the decision.
29. The parties are both over the age of 18 years and therefore the criteria in cl.820.211(2)(c) is satisfied.

Are the additional criteria for a de facto relationship met?

30. Persons lodging an application for a partner visa on the basis of being in a de facto relationship must also meet the additional criteria in r.2.03A. These are: that the couple are both at least 18 years of age; and with limited exceptions, that the applicant has been in the de facto relationship for at least the period of 12 months ending immediately before the date of the application, unless he or she can establish compelling and compassionate circumstances for the grant of the visa. The requirement that the relationship existed for 12 months prior to the application does not apply in certain circumstances where the sponsor is or was a humanitarian visa holder, or for applications made on or after 9 November 2009, where the de facto relationship has been registered under a relevant State or Territory law: r.2.03(4), (5).
31. The Tribunal has been provided with a NSW Births, Deaths and Marriages Relationship Certificate, registration [number], which states the parties registered their relationship [in] August 2016. The Tribunal finds the parties' relationship is registered under NSW law.
32. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.
33. Therefore the applicant meets cl.820.211(2)(a) and cl.820.221.

Does the applicant meet Schedule 3 criteria, or should those criteria be waived?

34. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).
35. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria. These criteria are set out in the attachment to this decision.

Criterion 3001

36. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2), as set out in the attachment to this decision.
37. The applicant's last substantive visa ceased in August 2014 and she submitted the application for a Partner visa in November 2016. Having regard to the definition of the relevant day in criterion 3001(2) the Tribunal finds that the applicant did not make the application within 28 days of the relevant day, which was 13 August 2014.
38. As the visa application was not made within 28 days of the relevant day, the applicant does not satisfy criterion 3001.

Compelling reasons

39. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.

40. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Bab Ricci v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.
41. Department policy states that the provisions are not intended to give, or be perceived to give, an unfair advantage to persons who fail to comply with their visa conditions or who deliberately manipulate their circumstances to give rise to compelling reasons. The Tribunal has had regard to policy guidance in the Department's Procedures Advice Manual (PAM 3) which states that the intent of the waiver provisions is to allow persons whose circumstances are genuinely compelling to regularise their status.
42. The Tribunal is not bound by Department policy. What amounts to compelling reasons in each case is a question of fact, having regard to all the circumstances of the case. To find whether compelling circumstances exist, the Tribunal is required to look at all of the circumstances of the case.
43. *The applicant's visa status and length of time she has been in Australia*
44. The applicant contends that she has at no stage since her arrival in Australia in 2008 been an unlawful noncitizen, as she has at all relevant times held either a substantive or Bridging visa. The Tribunal accepts this claim, but notes this is a requirement for all visa holders in Australia and is not persuaded it, or, in and of itself, the length of time she has spent in Australia since 2008, provides a compelling reason to waive the Schedule 3 criteria.
45. *Reasons for not holding a substantive visa*
46. The delegate acknowledged the applicant's claim she was a victim of fraud perpetrated upon her by [Mr B], but did not consider the circumstances whereby her application for a [Skilled visa] were refused provide a compelling reason for not applying the Schedule 3 criteria. Indeed the delegate drew an adverse inference from the appeal processes the applicant engaged in and subsequently withdrew from following the refusal of the [Skilled visa] application, suggesting the applicant would not in any event have met the criteria for a [Skilled visa] and that she contrived to enter into a non-genuine relationship to try to achieve an alternate pathway to a migration outcome that she was pursuing.
47. After considering the available evidence, the Tribunal does not share this view. The applicant readily admits she wants to remain in Australia, as she considers this country, unlike her home country, to be relatively free of discrimination against a person with her sexual orientation. She also concedes that a woman with her education has better prospects of a meaningful career in Australia and further to this, since the death of her maternal grandmother in 2014, she lacks any supportive relatives in Indonesia. In relation to the visa fraud, the applicant described getting a cold canvassing contact in 2014 from a person purporting to represent a recruitment agency after she had been very active on a range of online graduate employment sites looking for work on the basis of her [qualifications]. The applicant said this person, "[Ms C]" said they had suitable [positions] they could link her with and also connect her to a migration agent who could assist her get the [Skilled visa]. The applicant said she had at all times utilised the services of migration agents or education consultants when she applied for a visa, as she is not aware of all the relevant immigration requirements and proceedings and the Tribunal considers this is a

plausible explanation for why she engaged who she thought was a reputable migration agent, linked with a recruitment agency.

48. The applicant contends that she was unaware that the entire set up, consisting of the recruitment agency, migration agent and proffered employer / sponsor for the [Skilled visa], was fraudulent and a con, organised by [Mr B]. The Tribunal accepts this evidence. The Tribunal also accepts that part of the 'con' was ongoing payments she had to make to [Mr B] in relation to the review and appeal processes engaged after the initial application for the [Skilled visa] inevitably failed. The applicant contends it was only after she discussed her situation with the sponsor that she realised she had been a victim of fraud in which she had been enticed to pay many thousands of dollars for the visa application and ongoing legal fees purportedly associated with the appeals. She said she withdrew from the appeal lodged with the FCC and that this was in effect the first decision she made under her own agency, rather than responding to the 'advice' given to her by [Mr B].
49. As I have indicated at an earlier point on this decision, I am satisfied the parties' relationship is genuine and not contrived purely to facilitate a pathway for the sponsor achieving permanent residency in Australia. I am further satisfied the applicant has provided a plausible reason as to why she withdrew her appeal to the FCC in November 2016. I am also satisfied, on the basis of the information provided with the review application, that [Mr B] and his associates engaged in widespread misleading conduct in which multiple visa applicants were defrauded of money for unsuccessful visa applications and that the applicant's claims are consistent with [Mr B]'s reported fraudulent behaviour.
50. The applicant contends that her not having a substantive visa at the time she applied for the Partner visa was beyond her control as she was, until in or around November 2016, unaware she was a victim of fraud in which both the purported migration agent and sponsoring employer/business were not what they seemed. She contends if she had engaged a recruitment agency and migration agent that were not con artists, any sponsor/employing business she would have been linked with would have been above board and she would have in all likelihood been granted the [Skilled visa]. She contends that if that were the case, she may not have needed to apply for a Partner visa after she and the sponsor became a couple and, in the event she did, she would have had a substantive visa at the time she lodged the application for the Partner visa. The applicant's oral evidence in relation to this reason is consistent with that contained in her affidavits and other written statements.
51. The Tribunal is satisfied that there is some merit to the contentions of the applicant with respect to this issue. However it is hypothetical as to whether she would have in other circumstances met the criteria for a [Skilled visa], as it is the delegate's view that she would not.
52. After considering all of the available evidence, the Tribunal is not satisfied that the applicant's immigration history and the circumstances which led her to not hold a substantive visa at the time of the application in and of itself provides a compelling reason for not applying the Schedule 3 criteria. I have, however, given some weight to this factor, which has been considered cumulatively with other factors.
53. *Longstanding and genuine nature of the parties' relationship*
54. As is discussed elsewhere in this decision, the Tribunal has found the parties were in a genuine relationship at the time of application and that they continue to so be at the time of this decision.
55. The Tribunal acknowledges that a longstanding genuine relationship, on its own, can be sufficient to establish a compelling reason. The applicant met the sponsor in August 2015;

they started dating in early November 2015, registered their relationship in August 2016 and were married, when legally able to, in June 2018.

56. The Tribunal is satisfied that the applicant and the sponsor have therefore been in a committed relationship since they registered the relationship in August 2016, a period well over two years. Their relationship can be appropriately regarded as long term. The Tribunal finds in and of itself the length of the parties' relationship does not constitute a compelling reason to not apply the Schedule 3 criteria, but has considered this issue in conjunction with other reasons put to it in this matter.

57. *Emotional impacts from a period of separation and the applicant returning to Indonesia*

58. The applicant contends she has suffered from anxiety and depression for a number of years, as a consequence of being a victim of visa fraud and other factors. She indicates the sponsor provides her with emotional support that assists her deal with the agitation and breathlessness associated with feelings of panic when her anxiety is acute. The applicant said she at times has strong feelings of worthlessness, powerlessness and hopelessness and at these times experiences suicidal ideation, which she acted on in 2014 through trying to overdose on pain relief medication.
59. The applicant expresses a fear of returning to her home country, where she would be socially isolated and without the support of the sponsor's actual presence. She said it would not be safe for the sponsor to accompany her to Indonesia, as same sex marriages are not recognised there and there is discrimination against and attacks upon members of the LGBTI community.
60. The sponsor gave evidence that she is very concerned about the applicant's mental health. She said the applicant suffers from generalised anxiety disorder and depression, in part because of her traumatic childhood experiences. She said the applicant's mental health has deteriorated since the Partner visa was refused and she is concerned about the risks associated with the applicant's forced return to Indonesia, if that was to occur. The sponsor gave evidence that her concern about the applicant's deteriorating mental health led her to take a position on a different [area] at [Employer 2] than that which she held at [Employer 1] so that she would be more available at night and weekends to spend time at home with the applicant. She indicated this is not a decision she took lightly as it comes at some cost to her [career], as she is not consolidating her experience in her chosen [area].
61. The sponsor said she has overheard the applicant's mother incessantly asking for money during phone calls. The sponsor said she does not consider that it would be safe for her to accompany the applicant to Indonesia due to the risks they would face there as a same sex married couple. She said their sexual orientation is criminalised in her home country, [Country 1], which makes it not viable for them to live there whilst the applicant applied for a Partner visa from an offshore location.
62. The applicant gave evidence she has benefitted from counselling she has received and thinks it is valuable she has had access to a counselling service that is comfortable offering a service to a person with her sexual orientation. She expressed fear of a circumstance where she returned to her home country, felt the need to seek counselling or psychiatric help, but did not know how to access a health professional that she could trust. She expressed fear that if she sought assistance from a health professional who reported her to the authorities as a lesbian, she would be at risk of attack or some form of risk.
63. The Tribunal reviewed a report of [Ms D], counsellor and coordinator of [specified program], dated 28 May 2019. [Ms D] states that the applicant has attended 14 counselling

consultations, in which she described her estrangement from her family back home in Indonesia and stated that she relies totally on the support of her partner here in Australia. [Ms D] expressed the opinion that without the stable and secure home the applicant has established with the sponsor, and if she had to return to Indonesia where her sexuality had to be hidden in fear of discrimination, vilification and rejection from her estranged family and Indonesia's general population, her anxiety and related mental health conditions would deteriorate.

64. The Tribunal has reviewed a report from [Dr E], forensic psychiatrist, dated 4 June 2019. [Dr E] reports that the applicant provided a history which described physical and emotional abuse by both her parents. These included incidents in which her mother physically beat her and also attempted to sell the applicant to a stranger to be his sexual partner, only desisting when a grandparent paid money to the applicant's mother. The applicant also described her mother using money that had been allocated for medical expenses related to a [Body Part 1], resulting in the applicant not receiving appropriate medical attention and being left with a permanent disability. [Dr E] reports that the applicant was affected by riots in Indonesia in 1998, where people of Chinese ethnicity were persecuted and she learnt that young Chinese girls were raped and killed. [Dr E] reports that the applicant felt suicidal and took an overdose of medication following the death of her maternal grandmother in 2014, and that further to this she was sexually assaulted by a fellow student who had invited her to his house under the pretext of assisting her with her curriculum vitae.
65. In terms of a psychiatric opinion, [Dr E] reports the applicant described a childhood that was characterised by abuse, neglect, trauma and discrimination in which she had lived in fear of persecution from her mother, who had threatened to kill her and sell her to men for sex. [Dr E] noted that the applicant's wellbeing initially improved in Australia but that *"Unfortunately, the experience with the charlatan, [Mr B], the abusive relationship with her first partner and the incident of sexual assault by her peer had adversely impacted on her self-confidence to deal with challenging situations and exacerbated her anxiety symptoms. The death of her maternal grandmother had been another stressful event"*.
66. [Dr E] reported that the applicant's presentation is consistent with a diagnosis of generalised anxiety disorder with comorbid depressive symptoms as per the criteria in the Diagnostic and Statistical Manual for Mental Disorders Version 5, and that her relationship with the sponsor is a protective factor. In summarising his view of the impact of the applicant returning to Indonesia, [Dr E] reported:
67. The effect of [the applicant's] forcible removal from Australia would understandably exacerbate her anxiety disorder and depressive symptoms. Even if the removal from Australia was temporary, [the applicant] would still feel highly anxious about being persecuted for her sexual preference in Indonesia. The lack of legislation against homosexuality in Indonesia is unlikely to stop the perpetrators of violence against homosexuals. [the applicant] also faces the risk of being forced into a marriage with a man in Indonesia and forced to engage in sexual activity against her sexual preference. [the applicant's] anxiety disorder and low self-confidence would impact on her ability to organise herself and focus on any tasks that would be required for her return to Australia. She is unlikely to receive much assistance given her limited social support in Indonesia.
68. If the removal was for unknown period of time or permanent, [the applicant] would not only experience exacerbation of anxiety symptoms and emotional distress for reasons identified earlier but also experience sense of hopelessness about the future. She has invested a lot of effort and a significant part of her life to live in a society where she did not feel discriminated and encouraged to pursue her career and ambitions. [The applicant] has also established a relationship with [the sponsor] who appears to be her main source of support and strength. Removal for unknown period of time or permanent removal from

Australia would most likely result in loss of relationship with [the sponsor] and end to her long held dreams of living in Australia. In such circumstances, her depressive symptoms would most likely evolve into a major depressive disorder in addition to her anxiety disorder. There would also be a heightened risk of completed suicide given her ongoing fleeting thoughts of suicide and the loss of the protective factor namely her current relationship.

69. The Tribunal has considered the evidence currently before it in relation to the applicant's mental health. The Tribunal is satisfied she suffers from generalised anxiety disorder with comorbid depressive symptoms. The Tribunal is satisfied the applicant's reliance on the sponsor for reassurance, emotional support and life stability is considerable, and that she is at significant risk of a serious deterioration in her mental health if required to return to her home country. The Tribunal is satisfied the risks to the applicant's mental health are in and of themselves sufficient to warrant a waiver of the Schedule 3 criteria.

70. *The applicant's estrangement from her family of origin*

71. The applicant contends she has now being in Australia for 11 years and that she is left with no viable support networks if she was to return to Indonesia. She said she has felt comfortable to be true to her lesbian sexual orientation in Australia and that she would be at risk in a variety of ways if she was to return to Indonesia. She contends that her maternal grandmother, who passed away in 2014, was the only supportive relative she had whilst growing up. She said her parents separated when she was young and she has had limited contact with her father, who was in any event abusive towards her. She said she was born with a male fraternal twin and that a number of her relatives, including her paternal grandfather thought she should marry her brother, as this is a traditional Chinese custom. She said her maternal grandmother disagreed and protected her from this eventuality through rearing her when she was young. She said her mother has never supported her and that whilst there is no current risk she would be forced to marry her twin brother, her family would pressure her to marry a man if she returned to Indonesia, as she is now considered to be old for a single woman.
72. The applicant said that her family in Indonesia are unaware of her sexual orientation and if they knew and she was back in Indonesia this would provide them with a further reason to force her to marry a man, so as to remove the 'shame' of her sexual orientation.
73. The Tribunal accepts the applicant's claims with regard to her estrangement from her family of origin in Indonesia and considers this to add weight as a compelling reason to waive the Schedule 3 criteria.

74. *The lack of LGBTI rights in Indonesia*

75. The applicant and sponsor gave consistent evidence as to concern arising from the treatment of members of the LGBTI community in Indonesia. Country information available to the Tribunal¹ is consistent with the applicant's claims regarding the lack of protection for LGBTI rights in her home country and the information provided with the review application in support of this claim. A recent DFAT report highlights the following concerns:

76. DFAT assesses that LGBTI people face a high risk of societal discrimination: traditional views about sexuality and gender restrict their participation in the workforce and the broader community. This applies particularly in areas outside of Jakarta and Bali and for those from poorer backgrounds. Those perceived to be LGBTI may face a risk of violence, particularly if living in religiously conservative areas, including Muslim and Christian communities. DFAT assesses that LGBTI people face a moderate risk of homophobic, transphobic or anti-waria violence. LGBTI individuals face a moderate risk of official discrimination due to national laws that discriminate

¹ DFAT Country Information Report Indonesia 25 January 2019

against them based on their sexuality, and due to official attitudes. LGBTI people living in Aceh face a high risk of official and societal discrimination and violence.

77. Significant social stigma attaches to LGBTI people: a 2013 study by the Pew Research Center found 93 per cent of Indonesians surveyed believed society should reject homosexuality. This stigma has contributed to a 'don't ask, don't tell' mentality. Although dozens of prominent Indonesians are 'known' to be gay or lesbian, including politicians and celebrities, or to have gay or lesbian family members, they rarely acknowledge this publicly. Considerable social pressure pushes gay men and lesbians to enter into heterosexual marriages, and many lesbians are reportedly victim to 'corrective rapes'. Family violence against LGBTI individuals is reportedly common. The term 'LGBT' itself attracts considerable hostility from many Indonesians, who view it as a western imposition. Since 2016, cancellations of public events, gatherings and discussions by LGBTI people have increased.

78. Families and officials have subjected LGBTI people to 'therapy' intended to convert them to heterosexuality including, in some cases, after arrest. Psychologists in Indonesia are divided on whether or not LGBTI identities are a mental illness. In the past, LGBTI people have been enrolled in government disability programmes.

79. Public spaces for lesbians to meet do not exist. Lesbians may organise or meet among themselves using social media, but must do so discreetly. Lesbians report being denied pap smears and other medical tests or treatments because they do not have a marriage certificate. Women who live together in employer-provided accommodation, for example in the construction industry, may be accused of being lesbians and targeted by vigilantes. Women considered unfeminine in their dress, hair or mannerisms may be targeted by actions ranging from low-level harassment and social discrimination to eviction by landlords and vigilante home invasions.

80. The Tribunal accepts the applicant would be at risk of discrimination, or worse if she was to return to Indonesia and her sexual orientation became known by members of her family of origin or the community at large. The Tribunal is satisfied that weight should be accorded to this factor when considering whether there are compelling reasons to waive the Schedule 3 criteria in her case.
81. Noting that whilst it is open to the applicant to apply for a Protection visa in light of the concerns she holds as to her safety if she was to return to Indonesia, the Tribunal is satisfied that when the evidence as to compelling reasons is considered cumulatively, this is only one of a number of relevant compelling reasons upon which considerable weight has been placed.
82. The Tribunal is satisfied that there are compelling reasons for not applying the Schedule 3 criteria. Accordingly, the applicant meets cl.820.211(2)(d)(ii).
83. Therefore, the applicant meets cl.820.211.
84. The Tribunal further finds that at the time of this decision, the applicant is the sponsor's spouse, and therefore continues to meet the requirements of cl.820.211(2).
85. As a consequence the applicant meets cl.820.221.
86. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

87. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl.820.211(2)(a) of Schedule 2 to the Regulations;
 - cl.820.211(2)(d)(ii) of Schedule 2 to the Regulations;
 - cl.820.221 of Schedule 2 to the Regulations;
 - r.2.03A.

David Barker
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

Schedule 3

3001

- (1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).
- (2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:
 - (a) if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa — 1 September 1994; or
 - (b) if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa — the day when the applicant last became an illegal entrant; or
 - (c) if the applicant:
 - (i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
 - (ii) entered Australia unlawfully on or after 1 September 1994;whichever is the later of:
 - (iii) the last day when the applicant held a substantive or criminal justice visa; or
 - (iv) the day when the applicant last entered Australia unlawfully; or
 - (d) if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation — the later of:
 - (i) the day when that last substantive visa ceased to be in effect; and
 - (ii) the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision.

3003

If:

- (a) the applicant has not, on or after 1 September 1994, been the holder of a substantive visa; and
- (b) on 31 August 1994, the applicant was either:
 - (i) an illegal entrant; or
 - (ii) the holder of an entry permit that was not valid beyond 31 August 1994;

the Minister is satisfied that:

- (c) the applicant last became an illegal entrant, or, in the case of a person referred to in subparagraph (b)(ii), last became a person in Australia without a substantive visa, because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with the conditions that apply or applied to:
 - (i) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (ii) any subsequent bridging visa; and
- (f) the applicant would have been entitled to be granted an entry permit equivalent to a visa of the class applied for if the applicant had applied for the entry permit immediately before last becoming an illegal entrant or, in the case of a person referred to in subparagraph (b)(ii), if the applicant had applied for the entry permit on 31 August 1994; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) the last entry permit (if any) held by the applicant was not granted subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

3004

If the applicant:

- (a) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
- (b) entered Australia unlawfully on or after 1 September 1994 and has not subsequently been granted a substantive visa;

the Minister is satisfied that:

- (c) the applicant is not the holder of a substantive visa because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with:
 - (i) the conditions that apply or applied to:
 - (A) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (B) any subsequent bridging visa; or
 - (ii) the conditions that apply or applied to:
 - (A) the last of any substantive visas held by the applicant (other than a condition of which the applicant was in breach solely because the visa ceased to be in effect); and
 - (B) any subsequent bridging visa; and
- (f) either:
 - (i) in the case of an applicant referred to in paragraph (a) — the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive or criminal justice visa; or
 - (ii) in the case of an applicant referred to in paragraph (b) — the applicant would have satisfied the criteria (other than any Schedule 3 criteria) for the grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) if the last visa (if any) held by the applicant was a transitional (temporary) visa, that visa was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.